



COMMONWEALTH OF MASSACHUSETTS
Board of Registration
of
Hazardous Waste Site Cleanup
Professionals

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PROFESSIONAL CONDUCT COMMITTEE
Minutes of Meeting on May 23, 2007
[Approved on July 30, 2007]

Prepared by: Lynn Peterson Read

Meeting Location: Massachusetts Department of Environmental Protection, Northeast Regional Office, 205B Lowell Street, Wilmington, Mass.

1. **Call to Order:** Kirk Franklin called the meeting to order at 12:35 p.m. Also present were Gail Batchelder, Deborah Farnsworth, Christophe Henry, Gretchen Latowsky, Paul Mullen, Debbie Phillips, and Kelley Race. Committee members absent: Robert Luhrs. Staff members present were Allan Fierce, Brian Quinlan, Lynn Read, Terry Wood, and Allen Wyman. Also present were Wesley Stimpson, the LSP Association's (LSPA's) Executive Director, and Larry Feldman, president-elect of the LSPA. Janine Commerford and Debra Stake arrived while the meeting was in progress.
2. **Announcements:** None.
3. **Previous Minutes:** After discussion, the draft minutes of the meeting held on April 18, 2007, were approved.
4. **Old Business**

A. Status of CRTs

Mr. Fierce noted that the Board continues to await decisions in two cases in which hearings were held before the Division of Administrative Appeals (DALA) in 2005 and 2006. Mr. Fierce asked whether the Board wished to invite Chief Administrative Magistrate of DALA, Christopher Connolly, to the next meeting of the Board, to discuss the delays encountered by the Board in obtaining recommended decisions from DALA after hearing. The members present discussed various options, and agreed that the Chairs of the Board and the Committee would try to meet with Mr. Connolly at his convenience before the next Board meeting.

At Mr. Franklin's request, the chair of each CRT reported on progress made during the last month.

B. Website Subcommittee

Mr. Fierce stated that the subcommittee has not met.

C. Reconsideration request regarding dismissal of complaint 06C-05

Ms. Phillips and Mr. Fierce are recused. Having considered (1) the Complainant's request that the Committee reconsider its original dismissal of the Complaint, and (2) the additional information submitted by the Complainant, the screening panel of Debra Stake, Kelley Race and Deborah Farnsworth recommended that the Committee re-affirm its dismissal. Ms. Read presented a draft letter notifying the Complainant that the Committee re-affirms the dismissal of Complaint No. 06C-05. The discussion and the draft letter did not include the names of any parties, the site, or the municipality. The Committee reviewed the wording of the draft letter, and it was suggested that procedural information be added. The non-recused members of the Committee voted unanimously to accept the panel's recommendation to re-affirm the dismissal of this Complaint and to approve the letter with the changes.

D. Review of draft dismissal letter re: complaint 07C-02

Ms. Wood presented a draft letter that reflected the Committee's previous vote to dismiss the complaint against the LSP for lack of jurisdiction and to send the LSP a dismissal with warning letter stating that, although the version of the MCP regulations in effect in June 2005 did not require that the complainant, an abutter, be notified before samples were taken from his property, the MCP regulations were recently changed to require notification of abutters. The letter did not include the names of any parties, the site, or the municipality. The Committee voted to approve the letter.

E. Review of Draft Policy regarding Timelines for Completing Disciplinary Cases

Mr. Fierce presented the new Draft Policy that reflected the Committee's discussions at the previous meeting on April 18, 2007. He pointed out that the new Draft Policy refines the Timeline for Investigation (section 4) to address the concern that the current case backlog and short staffing situation (vacant administrator position is being advertised) would make it impossible for the Board to manage existing cases while simultaneously meeting policy timelines for new cases. To address this concern, until September 1, 2007, the new Draft Policy (footnote 3) allows 90 days from receipt of the LSP's response to the Complaint to the Board's decision to dismiss or investigate. After September 1, the Timeline allows 30 days from the Board's receipt of the response to acceptance or dismissal.

Those present discussed section 3, Number of Investigations Resolved Annually, in which the Board would "strive to complete the investigation of at least ten complaints annually" on the list of Active Disciplinary Cases. Several members expressed the view that although the Board has met this goal for the past year, this goal may not be realistic in upcoming years.

Mr. Henry agreed that the Board needs a yearly goal for closures of investigations, but noted that the timeline allows eight months to resolve each Complaint, and thus a yearly goal of 10 closures is too aggressive. He proposed that since each CRT consists of two of 11 Board members, a more realistic number would be six to seven complaints resolved each year.

Ms. Commerford pointed out that if the Board were able to follow the Timelines for Investigations, then the Board would keep up with the current intake of cases. She stated that the purpose of the 10-case goal is to eliminate the backlog and thus accomplish more than the steady state that would result from simply following the timelines. The Draft Policy sets out a process in which the Board will both eliminate the backlog and work on Complaints as they arrive at the Board.

Mr. Fierce, Ms. Commerford, and Mr. Franklin urged the Board to adopt the Draft Policy, with the goal of ten closed investigations per year. Mr. Fierce noted that goals are intended to be a little aggressive, to encourage better performance. Then, if the organization cannot meet the goals despite a concerted effort, this can be used to demonstrate that the Board needs more resources. He noted that section 6 of the Draft Policy requires the staff attorney to document the reasons for any inability to meet the Timelines. It also requires the Executive Director to report the overall results, evaluate factors that caused delays and recommend steps that could improve timeliness of investigations and adjudications. Thus, the Board either meets the goal or obtains documentation of the specific reasons outside its control explaining why it cannot. The Board thus would gain documentation of the resources it needs to meet the goal.

Ms. Wood pointed out that appeals require such a large amount of time that having even one or two could prevent the staff from concluding ten investigations during a year. In light of such unforeseeable factors, some Committee members questioned whether the goal of completing ten investigations per year should be codified in the Policy, or whether the goal more appropriately belongs in the Board's annual "Program Priorities" document. Mr. Fierce noted that the most recent Program Priorities goal was eight completed investigations in FY-07, and the Board had exceeded that goal but continues to have a small backlog of investigations. Several members expressed concern that the Board could face public criticism and pressure if it does not meet goals the Board itself has established, which would cause problems if the factors that caused the Board not to meet the goal were outside its control. Ms. Race and Ms. Latowsky expressed concern that the LSPA might file legislation requiring the Board to dismiss Complaints not closed within the period set by the Timelines. Others have filed such legislation on two prior occasions. Ms. Race and Ms. Commerford agreed the Board should establish aggressive goals for closing investigations, but believe the numerical goal should be located in the Program Priorities document instead of the policies.

Some members asked whether the Timeline's allowance of 180 days from the decision to investigate until the delivery to the Board of a CRT Report or signing of ACO is sufficient. Mr. Fierce emphasized two points: first, the 180 days applies only to new cases after the Board adopts this Policy; and second, 180 days is usually somewhat longer than an active CRT needs to complete its investigation and prepare a report, and thus 180 days is a reasonable allowance. Also, there is no expectation that the Board will entirely eliminate the

backlog during the period from now until September 1, 2007. As to cases now under investigation, the Timelines apply prospectively to the remaining phases of the investigative process. The members discussed how to minimize the time to obtain DEP file documents and audit histories relating to sites and LSPs subject to Complaints.

Mr. Fierce emphasized that a key purpose of the Policy and the Timelines for Investigation is to eliminate a gap between the time the Board receives an LSP's response to a Complaint, and the beginning of the active investigation, during which a case sits on hold for an indefinite period. He and Ms. Commerford emphasized that the Timelines break down the goal into steps, and the Policy does not set a strict time to eliminate the backlog, but starts a new initiative to work on new cases as soon as the Board receives them.

The Board voted, by a vote of eight (8) in favor and two (2) opposed, to implement the Draft Policy as follows:

- (1) The Board modified the Draft Policy by deleting Section 3;
- (2) The Board approved the Draft Policy as so modified, for a trial period of six months beginning September 1, 2007;
- (3) The Board directed that the goal of 10 concluded investigations be added to the Program Priorities document for FY-08.

Ms. Latowsky and Ms. Farnsworth opposed the motion.

5. New Business

A. Complaint No. 07C-004

The Board voted to accept Complaint No. 07C-004 for investigation. Mr. Wyman and Ms. Read stated that this new Complaint from DEP was against an LSP who is already under investigation in Complaint No. 00C-018 (filed by a private party). The Board assigned the new Complaint to the existing CRT.

B. Request for Advisory Ruling

Mr. Feldman presented orally his request for advisory opinion, which he had filed with the Board in writing on May 7, 2007. Mr. Feldman stated that LSPs perceive a conflict between the provisions in the Board's regulations that encourage or even require an LSP to rely in part upon the advice of reasonably qualified professionals (309 CMR 4.02(2), (3)), and the provision that prohibits an LSP from rendering an LSP Opinion unless s/he has managed, supervised, or reviewed and evaluated the performance by others on whom the LSP relies for assessment, containment, or removal. 309 CMR 4.03(2).

Mr. Feldman stated that the tension between these two parts of the Board's regulations, which he characterized as a conflict, causes LSPs to question the extent to which they are responsible to ensure the accuracy of details within work performed by other contractors. For example, some LSPs are questioning whether the LSP is responsible for the accuracy of each calculation within a Risk Assessment, and in the design of remedial systems by

engineers. Mr. Feldman's written request for advisory opinion asserts that LSPs should be able to rely fully on the advice of other qualified professionals for those parts of the LSP Opinions that are outside the LSP's personal expertise, such as a remedial design by an engineer or the calculations in a Risk Assessment.

Mr. Fierce noted that initially, the Committee should always consider whether a request for Advisory Ruling meets the threshold requirements set forth in the regulations and in the Board's prior Advisory Rulings. He suggested that Mr. Feldman's request meets the formal requirements because he submitted it in writing and it pertains to an interpretation of the Board's Rules of Professional Conduct, as required by 309 CMR 5.01 and 5.02.

However, Mr. Fierce said, the request does not arise out of a specific situation at a site, and thus is hypothetical. Therefore, the Committee must consider whether this request meets the parameters developed by the Board for addressing hypothetical questions in an Advisory Ruling. In Advisory Ruling 94-01, the Board developed the following parameters:

- Are the factual circumstances clearly described?
- Is the regulatory interpretation an important one that would be of widespread interest?
- Or, does the request raise a concern that the Board would be interjecting itself into existing contractual or other monetary disputes between LSPs and third parties that do not concern the protection of public health, safety, welfare and the environment?

Mr. Fierce noted that a formal Advisory Ruling is binding on the Board; the party requesting it is entitled to rely on the Ruling at an adjudicatory hearing. 309 CMR 5.01(2).

Members noted that many LSPs would agree that the request raises an important issue, but the request covers so many different types of circumstances that the answer may be so general that it will not be useful to Mr. Feldman or the LSP community.

Committee Members noted that there is a minimum amount of knowledge that an LSP must have in each area of LSP practice. Even a technical Method 3 Risk Assessment performed by a Risk Assessor requires input and review by the LSP as to elements like identification of receptors, fate and transport, which the LSP has developed as part of the Conceptual Site Model. Similarly, in the design of remedial systems, the LSP must transmit to the engineer accurate and complete data that indicate what the remedy must accomplish, i.e., the LSP must be familiar enough with the data, and must review the specifications of the remedial system, to arrive at a reasonable certainty that the remedial system will in fact effectively remove or treat the concentrations of oil and/or hazardous materials present at the site to the extent necessary for the RAO classification claimed by the LSP.

Those present discussed whether the Board is justified in its assumption that all LSPs have a minimum level of knowledge in every area covered by the LSP Board's licensing examination. The Board recognizes there are technical areas in Risk Assessment and remedial engineering that will be outside the expertise of an LSP who has engaged an expert.

Mr. Fierce noted that at the Board's professional conduct course the Board's presenters, including Mr. Feldman, taught that each LSP has an obligation of reasonable due diligence,

to ensure that any other experts whom s/he engages receives correct and complete data and information about site features that may affect risk analysis, such as abutting residences. However, questions remain about whether the standard of reasonable diligence is an objective one or whether it is subjective, such that it would take into account the LSP's level of experience. Such questions about what is "reasonable" under the circumstances are often best left for resolution on a case-by-case basis, in the context of specific facts in disciplinary cases, rather than in the abstract in an Advisory Ruling.

Ms. Batchelder pointed out that the LSP is unquestionably responsible to verify the qualifications of the expert who is hired, because the LSP signs the Opinion, and the LSP is solely responsible for the Opinion. In her view, a non-obvious calculation error carried through into a conclusion, would be a mitigating circumstance that the Board would take into account in any case before it. In contrast, she and Mr. Henry stated that the LSP should be able to recognize a conclusion that does not make sense, given the site data. For instance, if a site with a Hazard Index of 10 comes to a closure with a finding of No Significant Risk, the LSP should be held responsible if s/he supports that conclusion. LSPs should be able to understand the material elements of the work presented to them.

Ms. Race cautioned that the Board's approach to questions of LSP responsibility for the work of others should not utilize the words "fully rely," "all," "any," or other such superlatives used in the request for advisory ruling because such terms are extremely inclusive, and would be inconsistent with the Board's case-by-case approach.

Ms. Wood, the Board's General Counsel, noted that the Board's regulations state that an LSP may rely "in part" upon qualified professionals. In her view, interpreting such language calls for a case-by-case analysis. When Mr. Feldman asked what "in part" means, Ms. Commerford replied that without knowing specific facts, the Board couldn't define "in part" for all circumstances. Mr. Fierce and Mr. Henry emphasized that the "reasonable care and diligence" standard of the Board's Professional Conduct regulations, 309 CMR 4.02, applies to the review of expert credentials and their work. An LSP may not accept the work of anyone with utter indifference to the accuracy and quality of their conclusions.

Mr. Franklin noted that in analyzing a complaint about an LSP's reliance on an expert, a CRT will ask if it was within the control of the LSP to manage and guide the work to avoid the error at issue. Mr. Henry pointed out that this same standard applies to the relationship between the LSP and their own staff. The LSP cannot take his or her staff's work for granted, but must exercise reasonable care and diligence to review the work product. When asked if this meant that the LSP would be held responsible for a laboratory error or failure to observe parameters such as hold-times, etc., Ms. Stake responded that an LSP must review the laboratory procedures generally, and make sure that overall, the data "makes sense." The Board is very unlikely to discipline an LSP for an isolated laboratory error or an isolated engineering calculation within a plan or report that otherwise incorporated sound data or calculations.

The Committee voted unanimously to deny the request for Advisory Ruling, and asked the staff to prepare a draft letter denying the request but including the guidelines discussed at the meeting, and to submit the draft letter to the Committee for review.

- 6. Future Meetings:** The Committee will next meet on June 20, 2007, at Cyn Environmental Services, 100 Tosca Drive, Stoughton, Massachusetts. The Committee will also meet on July 30, 2007, at a location to be determined in the New Bedford area.
- 7. Adjournment:** The Committee adjourned the meeting at approximately 2:47 p.m.